STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 18, 2007
v	No. 270444 Macomb Circuit Court
TERENCE ALVIN JOHNSON, Defendant-Appellant.	LC No. 2005-003139-FH

Before: Schuette, P.J., and Hoekstra and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of accosting a child under the age of 16 for immoral purposes, MCL 750.145a, and second-degree criminal sexual conduct, MCL 750.520c(1)(a). He was subsequently sentenced to concurrent terms of two to four years' imprisonment for his conviction of accosting a child for immoral purposes and to two to fifteen years' imprisonment for his conviction of second-degree criminal sexual conduct. Defendant appeals as of right. We affirm defendant's conviction of second-degree criminal sexual conduct, but vacate his conviction and sentence for accosting a child under the age of 16 for immoral purposes and remand this matter for correction of the judgment of sentence.

I. Basic Facts and Procedural History

In May 2005, several individuals observed defendant kiss and hug a young boy inappropriately while the two were sitting at a picnic table in a public park. Two of the witnesses observed defendant rubbing his groin area outside of his clothing while kissing the boy; another observed defendant touching the boy's groin area outside of his clothing and telephoned 911 to report the incident. When the police arrived, they determined that the boy was defendant's ten-year-old son. The boy told the officers that he and his father were praying and conducting Bible study at the table and did not kiss at all. At the subsequent trial on charges arising from the witnesses observations at the park, defendant was permitted to represent himself and was convicted and sentenced as stated above.

II. Analysis

A. Self-Representation

Defendant first argues that his convictions must be reversed and a new trial ordered because the trial court failed to assure that his waiver of the right to be represented by counsel at trial was knowing and voluntary. We disagree.

The right to represent oneself is included in the right to counsel guaranteed by the Sixth Amendment of the United States Constitution and is specifically guaranteed by the Michigan Constitution. US Const, Am VI; Const 1963, art 1, § 13. However, before permitting a defendant to dismiss his counsel and represent himself, the trial court must determine that (1) the defendant's request is unequivocal, (2) the defendant is asserting the right knowingly, intelligently, and voluntarily, and (3) the defendant's self-representation would not disrupt, inconvenience, or burden the court. *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976). The trial court must also comply with MCR 6.005(D), which requires the court to offer the defendant the opportunity to consult with an attorney, and advise him of the charge, the maximum prison sentence associated with the offense, and the risk involved in self-representation. See *People v Williams*, 470 Mich 634, 642-643; 683 NW2d 597 (2004).

Defendant contends that the trial court did not comply with the requirements of *Anderson* and MCR 6.005(D), and thus "failed to assure" that his waiver of counsel was both knowing and voluntary. We note, however, that mechanical adherence to these procedures, which "are merely vehicles to ensure that the defendant knowingly and intelligently waived counsel with eyes open," is not required. *People v Adkins (After Remand)*, 452 Mich 702, 725; 551 NW2d 108 (1996), overruled in part on other grounds by *Williams*, *supra* at 641. Rather, a trial court need only substantially comply with the requirements of *Anderson* and MCR 6.005(D). *People v Russell*, 471 Mich 182, 191; 684 NW2d 745 (2004); see also *Adkins*, *supra* at 726-727 (rejecting a "word-for-word litany approach" in favor of a "substantial compliance" standard). "'Substantial compliance requires that the court discuss the substance of both *Anderson* and MCR 6.005(D) in a brief colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures.'" *Russell*, *supra* at 191, quoting *Adkins*, *supra*.

Defendant argues that the trial court did not sufficiently convey to him "the pitfalls and dangers of proceeding pro se." In doing so, defendant correctly notes that a trial court does not sufficiently advise a defendant of the risks of self-representation if it merely warns the defendant that he proceeds at his own peril, even if the court cautions the defendant he will have to abide by "the same rules that the lawyers follow." *People v Blunt*, 189 Mich App 643, 645, 649-650; 473 NW2d 792 (1991). In *People v Hicks*, 259 Mich App 518, 531; 675 NW2d 599 (2003), however, this Court held that cautioning the defendant that self-representation would be "very unwise" and that "a man who chooses to represent himself has a fool for a client," in conjunction with a warning that he would be expected to follow the rules of evidence, was sufficient to advise the defendant of the risks of proceeding pro se. Here, the trial court did more than just warn defendant that representing himself was foolish and a mistake. On November 11, 2005, defendant made his request to represent himself at the January 2006 trial and was warned by the trial court that he would not be permitted to turn the "courtroom into a circus" and would thus need to know the rules of evidence. Thus, unlike the defendant in *Blunt*, *supra* at 650, who "hastily" decided to represent himself mid-trial, defendant made his first request to represent himself several months before trial and had adequate time to ponder the trial court's warnings. Then, on the first day of trial, the court expanded its warning to defendant, telling him "how

foolish" self-representation would be and indicating to him that he was making a mistake by dismissing his appointed counsel, whom defendant acknowledged was a good lawyer. The court then again cautioned defendant that he would be held to the rules of evidence and that he would be expected to respond to objections, of which there would be many because he lacked legal training.

Moreover, when defendant changed his mind following jury selection and declared that he wished to have counsel represent him, he told the court he thought that would be "wise," which shows that defendant was aware before trial of the risks he was taking by representing himself. During a hearing on January 30, 2006, defendant, after again changing his mind and requesting to proceed pro se, once more stated that he understood the "consequences" of that choice. Finally, before opening statements began on March 7, 2006, the court again advised defendant about the "drawbacks" of his decision because of his lack of legal training. On this record, we conclude that the trial court substantially complied with the requirement that it inform defendant of the risks involved in self-representation, as required by MCR 6.005(D).

The trial court also substantially complied with the remainder of the requirements of MCR 6.005(D). Defendant acknowledged that he was aware of the charges against him when he first asked to represent himself in November 2005. Although the court did not explicitly tell defendant before trial that he faced a maximum possible penalty of fifteen years, defendant knew that to be the case after he participated in the lengthy discussion regarding a plea agreement before trial began. In addition, defendant had been tried twice before and convicted once of second-degree criminal sexual conduct, and thus surely knew the penalty he faced and what to expect at trial. See, e.g., *Adkins*, *supra* at 730-731 (indicating that a trial court's failure to inform a defendant of the charges and possible punishment does not preclude a finding of substantial compliance where the defendant has prior knowledge of those facts). The record reflects that defendant was also offered the opportunity to consult with counsel and, in fact, took advantage of that opportunity.

We recognize that our Supreme Court has opined that the trial court must make an express finding that the defendant fully understands his waiver of counsel, *Russell*, *supra* at 191, and the court below did not make an express finding in this regard. As defendant correctly notes, the court additionally failed to affirmatively determine whether defendant's self-representation would unduly disrupt the proceedings. See *Anderson*, *supra* at 368. However, "[w]here there is error but it is not one of complete omission of the court rule and *Anderson* requirements, reversal is not necessarily required." *People v Dennany*, 445 Mich 412, 439; 519 NW2d 128 (1994). Rather, "[w]hether a particular departure justifies reversal 'will depend on the nature of the noncompliance.'" *Id.*, quoting *Guilty Plea Cases*, 395 Mich 96, 113; 235 NW2d 132 (1975). Under the circumstances of this case, "[t]o permit . . . defendant . . . to indulge in the charade of insisting on a right to act as his own attorney and then on appeal to use the very permission to defend himself in pro per as a basis for reversal of [his] conviction and a grant of another trial is to make a mockery of the criminal justice system and the constitutional rights sought to be protected." *Williams*, *supra* at 645 (citation and internal quotation marks omitted). The record demonstrates that defendant was aware of his right to counsel, the seriousness of the charges against him, and the risks of self-representation, and nonetheless "chose in the clearest terms" to represent himself. *People v Morton*, 175 Mich App 1, 8; 437 NW2d 284 (1989). The trial court's failure to make an express finding that defendant fully understood his waiver of counsel

or that defendant's self-representation would not unduly disrupt the proceedings does not, therefore, require reversal. *Dennany*, *supra*.

B. Prior Bad Acts Evidence

Defendant next argues that the trial court erred when it admitted evidence of prior bad acts, specifically, testimony that defendant had sexually abused his son and daughter in the past. Again, we disagree. The admissibility of bad-acts evidence is within the trial court's discretion and the decision to admit evidence will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). The abuse of discretion standard acknowledges that there may be more than one reasonable and principled outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *Id*.

MRE 404(b) is a rule of inclusion and only bars the admission of evidence of a defendant's prior crimes or "bad acts" if that evidence is used to prove the defendant's bad character and his propensity to act in conformity with it. *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993). To determine the admissibility of the evidence, the courts use a three-part analysis. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). First, the "prior bad acts" evidence must be offered for a purpose other than a character or propensity theory. *Id.* Second, the evidence must be relevant under MRE 402. *Id.* Third, the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. *Id.* If admitted, the court may provide a limiting instruction to the jury if requested. *Id*.

The prosecutor offered testimony regarding defendant's past sexual abuse of his son and daughter for the proper purpose of proving defendant's common plan or scheme used to choose his victims and carry out his assaults. Defendant argues that the prior acts were not similar enough in nature to the instant offense to be relevant to prove a common scheme or plan and that, even if they were, their admission into evidence at trial was substantially more prejudicial than probative. We do not agree.

"[E]vidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). For prior acts to be relevant to show a common plan or scheme, the charged and uncharged acts must share similar features beyond the "mere commission of sexual abuse" so that they indicate a plan or common scheme and not simply "a series of similar spontaneous acts." *Sabin*, *supra* at 66. Relevance does not require that the features be "'distinctive or unusual'" but they must "'support the inference that the defendant employed the plan in committing the charged offense.'" *Id*., quoting *People v Ewoldt*, 7 Cal 4th 380, 403; 867 P2d 757 (1994).

In this case, there are significantly more similarities between the incident in the bowling alley parking lot with defendant's son and the charged offense than defendant concedes. Not only did both involve defendant's child and sexual touching, in both incidents, defendant took advantage of his parenting time with his son to commit the acts. In both incidents, the two also claimed to be having Bible study and praying, which, contrary to defendant's argument, is a rather distinctive modus operandi. Further, both incidents took place in public places and in both

cases defendant's son denied that anything inappropriate occurred. Although defendant was not observed touching his son in the parking lot, both incidents involved touching of defendant's genital area through clothing. These similarities are sufficient to support the inference that defendant used a common scheme or plan to select his victim and to carry out his abuse.

Testimony concerning the sexual abuse suffered by defendant's daughter was also sufficiently similar to the charge offense to support a common plan or scheme. Again, the victim was defendant's child, and defendant inappropriately kissed both children and touched both children in the groin area over clothing. The children were also of similar age and under his exclusive parental-control when the touching occurred. See *Sabin*, *supra* at 66. Although this instance of prior abuse involved defendant's female child and was not perpetrated in a public place, admissibility does not require "a high degree of similarity between the proffered other acts of the defendant and the charged acts." *Knox*, *supra* at 510. Rather, the proffered other acts need only be sufficiently similar to be probative of something other than the defendant's character or propensity to commit the charged offense. *Id*. at 511. Here, the similarities between the charged conduct and defendant's prior abuse of his daughter were sufficient to be probative of defendant's common plan or scheme in the choice of his victims and method of abuse to warrant admission. See *Sabin*, *supra* at 67.

Further, the probative value of the prior acts evidence was not substantially outweighed by its prejudice. *Knox*, *supra* at 509. MRE 403 does not bar prejudicial evidence, only unfairly prejudicial evidence. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Crawford*, *supra* at 398. Evidence is not unfairly prejudicial merely because it is very damaging to the defendant. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995). We also note that whether the probative value of evidence of bad acts is substantially outweighed by the danger of unfair prejudice "is best left to a contemporaneous assessment of the presentation, credibility and effect of testimony" by the trial judge. *People v Bahoda*, 448 Mich 261, 291; 531 NW2d 659 (1995) (citation and internal quotation marks omitted). Although the testimony regarding defendant's prior sexual abuse of his children was certainly prejudicial, it was also highly probative of defendant's use of a system or plan to sexually assault his son, and rebutted defendant's denials that inappropriate behavior took place. The trial court did not abuse its discretion by admitting the evidence of defendant's prior abuse of his children.

C. Sufficiency of the Evidence

Defendant's final argument on appeal is that there was insufficient evidence to convict him of accosting a child for immoral purposes. On this, we agree with defendant. A challenge to the sufficiency of the evidence is reviewed de novo to determine whether, viewing the evidence in the light most favorable to the prosecution, a rational jury could find that the prosecution proved all the elements of the charged offense beyond a reasonable doubt. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001); *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

A defendant is guilty of accosting a child for immoral purposes if he "accosts, entices, or solicits a child less than 16 years of age . . . with the intent to induce or force that child . . . to commit an immoral act, to submit to an act of sexual intercourse or an act of gross indecency, or to any other act of depravity or delinquency, or . . . encourages [such] a child . . . to engage in

any of those acts. . . ." MCL 750.145a. Although the prosecution presented evidence sufficient to show that defendant committed an immoral act with his son by inappropriately kissing him and apparently masturbating in a public park, it failed to present any evidence, beyond the fact that these acts took place, that defendant accosted, enticed, solicited or encouraged his son's participation. We find the prosecution's argument that, because no child would engage in this behavior on his own, defendant must have accosted, enticed, solicited, or encouraged the child, unpersuasive.

The statute plainly requires that a defendant accost, entice, solicit or encourage a child's participation in the immoral act. Encourage means "to promote" or "foster." *Random House Webster's College Dictionary* (1992) at 440.[1] Accost is defined as "to confront boldly" or "to approach with a greeting, question, or remark." *Id*. at 9. Entice is defined as "to lead on by exciting hope or desire; allure; tempt; inveigle," *id*. at 446, or "[t]o lure or induce; esp. to wrongfully solicit (a person) to do something." Black's Law Dictionary (8th ed) at 573. Solicit is defined as "to try to obtain by earnest plea or application" and "to entreat; petition." *Random House*, *supra* at 1228. Solicitation is defined as "[t]he act or an instance of requesting or seeking to obtain something" or "[t]he criminal offense of urging, advising, or commanding, or otherwise inciting another to commit a crime." Black's Law Dictionary (8th ed) at 1427. Clearly, the plain language of the statute calls for more than the intent that the victim commit or submit to an immoral act. In fact, when construing a prior version of MCL 750.145a, this Court held that the offense "includes as an essential element the act of urging or entreating." *People v Wheat*, 55 Mich App 559, 563-564; 223 NW2d 73 (1974).[2] No such evidence was presented here.

Rather, the prosecution's only evidence was that defendant engaged in a sexual act with his son during a time when defendant was lawfully exercising parenting time. No evidence addressed whether defendant carried out the meeting with the intent to, or for the purpose of, soliciting, encouraging, enticing, or entreating the child's participation in the improper sexual act, as opposed to having merely acted on a spontaneous, unplanned impulse. The lack of any evidence to show a prior purpose or intent to encourage or otherwise solicit the immoral act observed at the park renders the evidence fatally insufficient. Thus, we conclude that the prosecution failed to prove the crime was committed beyond a reasonable doubt, and defendant's conviction for accosting a child for immoral purposes must be vacated.

---

[1] Where, as here, the Legislature has not expressly defined terms used within a statute, it is proper to use a dictionary definition to construe those terms "in accordance with their ordinary and generally accepted meanings." *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999).

[2] We recognize that the version of MCL 750.145a construed by the Court in *Wheat*, *supra*, employed the term "suggest." Although the Legislature has since amended the statute by replacing "suggest" with "encourage," see 2002 PA 45, we find no substantive difference in the meanings of these terms. Indeed, both terms connote the instigation or promotion of a particular act as prelude to engagement in the act itself. See *Random House*, *supra* at 1336 (defining "suggest" as "to mention, introduce, or propose (an idea, plan, person, etc.) for consideration, possible action, or some purpose or use," or "to prompt the consideration, making, doing, etc., of").

Defendant's conviction for second-degree criminal sexual conduct is affirmed. His conviction and sentence for accosting a child for immoral purposes are vacated. We remand for entry of a corrected judgment of sentence. We do not retain jurisdiction.

/s/ Bill Schuette
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter